

CHASE BARFIELD, et al.,) Case No. 11-04321-CV-C-NKL
)
Plaintiffs,) Jefferson City, Missouri
) November 15, 2018
vs.)
)
SHO-ME ELECTRIC COOPERATIVE,)
)
Defendants.)
)

APPEARANCES:

For the Plaintiffs: Ms. Kathleen C. Kauffman
1300 Pennsylvania NW, Ste. 700
Washington, D.C. 20004
(202) 594-6825

Mr. Ronald J. Waicukauski
301 Massachusetts Avenue
Indianapolis, IN 46204
(317) 633-8787

Mr. F. Alexander O'Neill
34 East Walnut
Thayer, MO 65791
(417) 264-7118

Ms. Heidi D. Vollet
231 Madison
Jefferson City, MO 65101
(573) 635-7977

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2
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4 For the Defendants:

Mr. Robert J. Wagner
Mr. David L. Coffman
One US Bank Plaza, Ste. 2700
St. Louis, MO 63101
(314) 552-6250

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11 Court Audio Operator:

Ms. Tania Lock

12
13
14
15 Transcribed by:

Rapid Transcript
Lissa C. Whittaker
1001 West 65th Street
Kansas City, MO 64113
(816) 914-3613

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1 (Court in Session at 1:00 p.m.)

2 THE COURT: Go ahead and be seated. This is the matter
3 of *Biffle vs. Sho-Me Power Electric Coop.*, Case No. 11-4321. Is
4 the plaintiff ready to proceed, Ms. Kauffman?

5 MS. KAUFFMAN: Yes.

6 THE COURT: And is the defendant ready to proceed?

7 MR. WAGNER: We are, Your Honor.

8 THE COURT: All right. Thank you. I understand that
9 the parties have reached a settlement in this case. I have
10 reviewed the parties' submissions seeking the approval of the
11 settlement. Is there any evidence or statements that either
12 party wishes to make to the Court at this hearing?

13 MS. KAUFFMAN: Well, Your Honor, I was going to briefly
14 summarize how thoroughly and completely we have established that
15 the settlement should be approved and that our fee request should
16 be granted. And I'm happy to do that, or await questions at Your
17 Honor's pleasure.

18 THE COURT: I think I'd prefer you to make the statement
19 to the Court --

20 MS. KAUFFMAN: Okay.

21 THE COURT: -- on the record. I do want to note that I
22 see only one person sitting in the back of the courtroom and I am
23 assuming that that is one of the parties to the case, is that
24 correct?

25 MS. KAUFFMAN: That is incorrect, Your Honor. He goes

1 by many names, but today it is my driver.

2 THE COURT: Oh, okay. Okay. So, he is not here for the
3 purpose of making any objection to the settlement.

4 MS. KAUFFMAN: No.

5 THE COURT: All right. I just wanted to get that on the
6 record. All right.

7 MS. KAUFFMAN: All right.

8 THE COURT: You may proceed.

9 MS. KAUFFMAN: May it please the Court? After eight
10 years, three failed mediations, two jury trials, the parties have
11 determined to conclude the litigation portion of this case on the
12 terms of the Settlement Agreement before the Court.

13 THE COURT: And I cannot tell you how grateful the Court
14 is to you.

15 MR. WAGNER: Here. Here.

16 THE COURT: Go ahead.

17 MS. KAUFFMAN: Today, the parties jointly request the
18 Court exercise its discretion to grant final approval of the
19 settlement because it is fair, adequate and a reasonable
20 resolution of the claims. The briefs before Your Honor have
21 thoroughly examined the Eighth Circuit authority, the Federal
22 Rules of Civil Procedure, the factual history of this case, so I
23 am only going to make a few key points, which I think are very
24 important to the conclusion that this is a fair, reasonable and
25 adequate settlement. First of all, after an intensive notice

1 program where most class members received notice twice and we had
2 intensive action on our website, there are no objections. There
3 are only nine opt-outs. I have done many of these cases across
4 the country and that is an extraordinary record on a suit
5 involving people's property rights.

6 The second key point is Judge Maughmer. This would not
7 have happened without his participation. The cases say that one
8 factor in deciding whether or not a settlement is fair is whether
9 the parties negotiated at arm's length and whether there is any
10 evidence of collusion or fraud. There is no evidence of
11 collusion or fraud.

12 THE COURT: That is certainly established.

13 MS. KAUFFMAN: The parties were at such arm's length
14 that we were not even permitted to sit in the same room during
15 the final successful mediation. The third point is that this
16 settlement is substantially the same as the *KAMO* settlement,
17 which Your Honor approved in 2015. It had the same notice
18 process. It has the same very simple claims process and nothing
19 goes back to the defendants.

20 Finally, I wanted to highlight the very small number of
21 changes between the *KAMO* settlement and this settlement, which I
22 also think argue in favor of the Court's approval. In *KAMO*, as
23 Your Honor may remember, there were three classes of benefits.
24 There was a ten cent a foot benefit if a parcel was, one, covered
25 by an easement that Your Honor had found did not support

1 trespass, but they still had the possibility with an appellate
2 claim. There was another Tier 2 benefit for the people in
3 Category 1E. And then there was a third class of benefits for
4 the people with parcels where Your Honor's summary judgment order
5 had established that they had a trespass claim. This case, this
6 settlement has only one class benefits. And they have only one
7 class of benefits because we've been up to the Eighth Circuit and
8 back down. They have held the trespass judgment. So, all of the
9 class members who can make claims under this settlement have good
10 claims. And the fund established under the settlement will in no
11 way be diluted by having to pay ten cents a foot to people
12 without valid claims. As the result of that and a higher,
13 proportionally higher settlement fund, the benefits here are 30
14 percent higher than the settlements -- than the benefits in *KAMO*.
15 We expect at least an equivalent claims rate. Because there's a
16 higher benefit, it would not be surprising if it was a higher
17 claims rate. But if we just assume the *KAMO* claims rate, the
18 \$3.68 per foot base level of benefit in this will double. And it
19 will be a very substantial amount of money per foot for the class
20 and certainly very substantial when compared not only to *KAMO* but
21 compared to many other settlements in this area, and extra-
22 ordinarily sufficient when compared to the offers of \$10 a parcel
23 that were being made around the time of the last trial.

24 The third change that I wanted to make sure Your Honor
25 was aware of is there is a possibility for a cy-près fund written

1 into the Settlement Agreement. It was one of the last provisions
2 and essential to the conclusion of the settlement. We will see
3 what we will see, but the option of requesting a cy-près does not
4 even kick in until the claims rate is only 30 percent. It is
5 entirely at Your Honor's discretion and obviously only if it is
6 consistent with then-prevailing Eighth Circuit law. And I
7 understand this is a hot topic in the Supreme Court right now.
8 And in class counsel's view, although the provision is there and
9 it was an important provision to completing this, those
10 thresholds are never going to get triggered in this case. Uponor
11 says the important item is a balance between the strength of the
12 case and the terms of the settlement. It will not surprise the
13 Court that that was the hardest thing for plaintiffs' counsel to
14 get past. We got past it. We're very comfortable with this. I
15 signed these papers. I am very comfortable with it. And I think
16 when one looks at continued litigation, meaning more expense and
17 delay, the fact that we've all been schooled in the risks
18 inherent in this case, and when you weigh those factors against
19 the terms of the settlement, it is clear that this settlement
20 should be approved and we ask the Court to exercise her
21 discretion to do so. I am ready to take questions on that if
22 Your Honor has any.

23 THE COURT: I have no questions.

24 MS. KAUFFMAN: Okay. With the Court's permission, I am
25 going to then move to approval of the financial awards --

1 THE COURT: Uh-huh.

2 MS. KAUFFMAN: -- which were also part of this motion.
3 Class counsel requests an award of one-third of the fund of 25
4 million. As Your Honor is aware, you have discretion on the
5 amount and also on the method. You could either use a percentage
6 of the fund or you could do a lodestar award. We think that a
7 percentage of the fund is the most simple, straightforward, the
8 right fit for this, and it is consistent with our retention
9 agreements with the class representatives. And frankly an award
10 under a lodestar would get us more money. And so it makes a lot
11 of sense to do a percentage of the award here. That is what the
12 Court awarded in *KAMO*. Your fee award in *KAMO* is Doc. No. 700.
13 The factors to consider when the Court exercises discretion to
14 award reasonable fees is the amount of benefit. Did the lawyers'
15 work confer a substantial benefit on the class. The checks to
16 the -- not only is the gross amount of the fund a good amount,
17 not only is the per foot award a good amount, but these are going
18 to be multi-thousand dollar checks going to class members and we
19 think we have conferred a very substantial benefit on the class.
20 Another factor is whether the lawyers had a risk of non-payment.
21 In this case we had a risk of no payment for eight years and
22 while working more than 30,000 hours and advancing costs and
23 expenses of over \$620,000. So, we think that factor fully
24 supports our fee request. Another factor is the difficulty of
25 the issues and whether they required skill. Your Honor has

1 walked this path with us and I will leave that issue to you. And
2 the final factor is there is no objection to the fee award. And
3 we fully disclosed to the class that we would -- the amount of
4 the fee we would be requesting and the estimated total amount of
5 costs that would also be subtracted from the settlement fund. I
6 believe we over-estimated. We told the class 1.2 million. By my
7 calculation that's going to leave, if Your Honor grants
8 everything we have asked for, class representatives, the
9 administrative expenses, the litigation costs, we will still have
10 328,000 left to cover the future claims process which is in
11 excess of every estimate we have about how much that claims
12 process is going to take. So, we were fully transparent with the
13 class and the class did not object at all. I find no objections
14 in this case surprising because property is important to people.
15 I find no objection to my attorney fee request pretty darn
16 extraordinary because, although they might be happy to get the
17 money, it is often the case that at least one person wants to say
18 that the attorneys are getting too much. And that did not happen
19 here. Another factor to consider is whether our request of a
20 third is within the range of awards approved in this circuit. In
21 your *KAMO* order, Document 700, in Paragraph 15, you have already
22 collected the cases supporting an award of one-third of the fund.
23 And that order came out in 2015. The body of law you looked at
24 then has been added to by the Eighth Circuit. *Caligiuri*, 2017 in
25 the Eighth Circuit, approved over class member objections, an

1 award of one-third of the fund, plus 738,000 in expenses, plus
2 \$2.4 million in administrative costs where the lawyers had spent
3 20,000 hours of time as compared to our 30,000. And the
4 multiplier was less than two. Our multiplier is not going to hit
5 1 in this case. And the case notes that multipliers have been
6 approved in the Eighth Circuit up to 5.6. In *Huyer*, also in
7 2017, the Eighth Circuit again upheld an award of one-third of
8 the fee plus administrative costs with a multiplier of 1.82. We
9 have provided Your Honor with the detail for a lodestar cross-
10 check. There are a lot of equations in that section of the
11 brief. There's a lot of detail in the declarations. As we were
12 going through it, and I realized we were going to have a
13 multiplier of less than 1 -- you know, you never know until you
14 sit down and do the math. I thought she's not even going to be
15 able to look at these five pages. But, Your Honor, if you want
16 to do a lodestar cross-check, all of the detail is there and
17 there is no windfall here.

18 Finally, we have asked for \$15,000 in additional
19 compensation for Mr. Robertson and \$15,000 jointly for the
20 Biffles. I have done a lot of class-action cases. This is more
21 than I usually ask for class representatives. And they have
22 fully earned it. Besides the usual of being subjected to a
23 deposition and having to look at pleadings, these class
24 representatives were major advisors to the process and they came
25 for two full trials and they took a lot of time off work. And we

1 ask that the Court award \$15,000 each to the two groups. And
2 that is my presentation on fees, Your Honor. Are there any
3 questions?

4 THE COURT: There are not. And I have reviewed all
5 these documents and I have to say this is a very reasonable
6 attorneys' fee.

7 MS. KAUFFMAN: Thank you.

8 THE COURT: I'll let the defendant address any issues.
9 I know you have deeds that you -- or something that you wish me
10 to consider signing deeds.

11 MR. WAGNER: Oh, we submitted yesterday to Renea by a
12 Word document the easement deed order by court, and we ask Your
13 Honor to enter that. And then, in addition, I have two small
14 housekeeping matters.

15 THE COURT: Yes.

16 MR. WAGNER: One is on language that Ms. Kauffman
17 submitted to Renea this morning on qualified settlement fund
18 treatment of the payment coming from Sho-Me, I gave Ms. Kauffman
19 permission to submit that to Renea and thereafter learned from
20 Sho-Me's tax attorney that he needs to look at that language a
21 little bit more. It may need to be tweaked because this is a
22 non-reversionary settlement. And we would get, in conjunction
23 with Ms. Kauffman, we'd get back to you with any tweaks for that
24 language within the next day or two.

25 MS. KAUFFMAN: And, Your Honor, Renea, I understand, is

1 not here. She got it at 11:30.

2 THE COURT: Right.

3 MS. KAUFFMAN: It is two paragraphs of language that we
4 would ask the Court to consider, including in the fee order. The
5 paragraphs are -- it is nothing substantive. We understand it is
6 language necessary under Treasury regulations to establish these
7 bank accounts as 468B-1 qualified.

8 THE COURT: Right.

9 MS. KAUFFMAN: The claims administrator needs that or
10 she's going to have to pay full IRS taxes on the full 25 million
11 when it gets deposited. And it is a -- it's a provision that
12 provides some flexibility in taxation. It permits the defendant
13 to take the full deduction when they make the deposit. And it
14 permits flexibility in when the recipients have to recognize the
15 revenue coming out of it. And it gives us some time to make the
16 division, because we expect that this money will be coming in
17 very close to the end of the year. So, we need both funds
18 qualified as 468B. Section 2 of the Settlement Agreement
19 provides for these funds to be qualified for 468B-1 funds. So,
20 this is consistent with the Settlement Agreement. The language
21 you have is what my tax advisors told me we needed to have. And
22 Mr. Wagner --

23 THE COURT: And this is the same language that their tax
24 advisor wants to review, or are we talking about --

25 MS. KAUFFMAN: That's right.

1 THE COURT: Okay.

2 MR. WAGNER: If I could? Essentially, Ms. Kauffman gave
3 it to me this morning. I don't think either one of us had raised
4 this with each other until this morning. And I was too quick to
5 say, Ms. Kauffman, the language is fine. So, right now a lawyer
6 in Kansas City is taking a look at it. And he may have no
7 changes for it. But in the possibility that he does, I will
8 immediately contact Ms. Kauffman and we'll get new language to
9 you forthwith.

10 MS. KAUFFMAN: And my only addition is it is always a
11 good idea to immediately say my language is fine quickly. And I
12 am -- I welcome another tax lawyer's review of the language. And
13 both sides just have an interest in making sure we have complied
14 with the regulation.

15 THE COURT: Because you both have an interest --

16 MS. KAUFFMAN: We both have an interest.

17 THE COURT: -- in the regulation being complied with.

18 MS. KAUFFMAN: Yes.

19 THE COURT: Okay. Now, I am assuming that that does not
20 delay the Court's entry of its judgment? Or should it all be
21 done at the same time perhaps because this is kind of an
22 overarching issue?

23 MS. KAUFFMAN: We would hope that those two paragraphs
24 -- Your Honor has to make Findings of Facts and Conclusions of
25 Law for the attorneys' fee portion. So, the way we proposed

1 those two paragraphs would permit you to simply sign the final
2 approval order and include those two paragraphs in the Findings
3 of Facts and Conclusions of Law on fees when Your Honor is ready
4 to issue that order.

5 THE COURT: Well, why don't we do this. Why don't you
6 work out that resolution and you provide me with the proposed
7 Findings of Fact and Conclusions of Law, or a proposed order
8 effectively.

9 MS. KAUFFMAN: I would be happy to do that, Your Honor.

10 THE COURT: Okay. And then that way it will be --
11 because you all have more vested in this being done exactly
12 right.

13 MS. KAUFFMAN: That is fine, Your Honor.

14 THE COURT: And I don't want to make a mistake with it.

15 MS. KAUFFMAN: That is fine. In terms of timing, I've
16 got to drive back to Minnesota. My expectation is you will have
17 that Monday morning --

18 MR. WAGNER: Oh, sure.

19 MS. KAUFFMAN: -- assuming I can get it to Mr. Wagner
20 and we are -- we continue to say on the same Kumbaya light
21 wavelength.

22 THE COURT: I really like hearing that.

23 MS. KAUFFMAN: Thank you, Your Honor.

24 MR. WAGNER: And then one last housekeeping point with a
25 respect to recording that Easement Deed by Court. That will be

1 attached to that Easement Deed when we take it to the courthouse
2 is a list of properties on a county-by-county basis that will
3 tell the recorder which properties are subject to the Court's
4 Easement Deed. When we get the list of properties finalized for
5 recording purposes, what we contemplate doing is coming forward
6 and filing a consent motion for approval of that finalized list.

7 THE COURT: Okay. So, you want me to approve the
8 current proposal, but then add that later on?

9 MR. WAGNER: Correct. Your final order will say that
10 you retain jurisdiction to enter supplemental orders with respect
11 to recording.

12 THE COURT: Okay.

13 MR. WAGNER: And this would fall within that provision.

14 THE COURT: All right.

15 MS. KAUFFMAN: It's also referred to -- that list of
16 parcels is referred to as Exhibit #1 to the Easement Deed. It's
17 really a separate document that comes later and that's why. We'd
18 be submitting it as Exhibit #1 later.

19 THE COURT: Okay. All right.

20 MS. KAUFFMAN: So, it doesn't change the --

21 THE COURT: So, it really is part of that same
22 agreement, it just isn't there yet.

23 MR. WAGNER: Correct.

24 MS. KAUFFMAN: Correct.

25 THE COURT: Okay.

1 MS. KAUFFMAN: Yeah.

2 MR. WAGNER: That's it, Your Honor.

3 THE COURT: Is that it?

4 MS. KAUFFMAN: That will come -- that won't delay the
5 approval of this at all. That's just -- we'll be working on that
6 over a period of time to get that finalized.

7 MR. WAGNER: When Your Honor -- if Your Honor approves
8 the settlement, Exhibit #1 of the settlement -- or I'm sorry,
9 Exhibit "A" of the settlement already lists the beginning and
10 ending points of each of the segments of the right-of-way. So,
11 you will be approving the eligible right-of-way.

12 THE COURT: Essentially the deeds that cover that area.

13 MR. WAGNER: Correct.

14 THE COURT: Yeah.

15 MR. WAGNER: This will be a description of the
16 individual properties.

17 THE COURT: Yeah. Okay.

18 MR. WAICUKAUSKI: Your Honor, can I just say one thing
19 on behalf of the plaintiffs' counsel?

20 THE COURT: Yes. Mr. Waicukauski.

21 MR. WAICUKAUSKI: We are very appreciative of all the
22 time and attention that you've given to this case over the last
23 eight years.

24 MS. KAUFFMAN: Yes.

25 THE COURT: Seems like a lifetime, doesn't it?

1 MR. WAICUKAUSKI: And the hospitality that you gave us
2 during two trials. And I just wanted to express on behalf of the
3 class and counsel how appreciative we are of your diligence and
4 your attentiveness to this matter over the years. Thank you.

5 THE COURT: Okay.

6 MR. WAGNER: May I echo that, Your Honor? You and your
7 staff have been very helpful.

8 THE COURT: My many law clerks.

9 MR. WAGNER: And also I'd like to (inaudible)
10 plaintiffs' counsel. As you've indicated and we've indicated
11 this morning, this has been a very contentious, hotly disputed
12 case, more so than any I've been involved in in my career. And
13 it really took a herculean effort to get this resolved. But
14 we're grateful that you're the one participating helping us get
15 it.

16 THE COURT: Well, I wish I could have invented a better
17 yesterday and have figured out how to get this resolved, you
18 know, three years ago rather than when we did get it -- when you
19 did get it resolved. And I really do credit Judge Maughmer. You
20 know, I've been in communication with Judge Maughmer about this
21 and I really do credit Judge Maughmer with being the magic
22 element that has made this possible. He is really a skilled,
23 skilled mediator. And, you know, does his homework to really
24 understand what the risks are of each party, so -- and has that
25 personal touch that makes people feel comfortable. And so I'm

1 very grateful, because I don't know where ultimately this case
2 would have ended up. I, as of today, could not tell you where it
3 was going to end up. And you all, I don't think, would know
4 either in advance where it was going to end up. So, thank you to
5 the parties and to the litigants and the lawyers because it has
6 been a hard-fought case. And I have so much admiration for both
7 sides.

8 MR. WAGNER: Thank you, Your Honor.

9 THE COURT: Maybe not the parties, but the lawyers.
10 That, you know, in a tough situation, I think for both sides, you
11 have been very professional, very thorough. You have, you know,
12 put my feet to the fire on more than one occasion and I
13 appreciate that. I think that's how we get to the truth best is
14 if you have two good advocates and they, you know, are able to
15 bring everything clearly to the Court. So, I really appreciate
16 the work that all of you have done. Outstanding lawyers.
17 Outstanding lawyers.

18 MR. WAGNER: Thank you.

19 THE COURT: So, with all this self-congratulation, let's
20 go ahead and do the orders because there is nothing here that is
21 going to deter me from approving the orders which you have
22 submitted to me. I can't imagine anybody second-guessing the
23 approval of this settlement. And so I do approve it pursuant to
24 the proposed Order and Judgment which I will sign. And also I
25 will execute the Easement Deed today as indicated in the order.

1 I will wait then for you all to come back to me with a proposed
2 order on the attorneys' fees and then the issue of the actual
3 parcels that will Exhibit #1 to the approval. I think those are
4 the only things that need to be approved. Have I checked off all
5 of the issues?

6 MS. KAUFFMAN: Well, the final approval order needs to
7 be signed and entered. The final approval states that this day
8 you are signing the Easement Deed by Court Order.

9 THE COURT: Correct.

10 MS. KAUFFMAN: We can wait to attach the attachment.
11 And Your Honor does not have the draft Findings of Facts and
12 Conclusions of Law as of yet, but we will draft them and get them
13 into you by Monday.

14 THE COURT: Yes. I don't mean to suggest in any way
15 that I'm not going to approve the -- I am approving the
16 distribution of the attorneys' fees. I think it is incredibly
17 reasonable given how long this case has taken and that you have
18 really had to put your heart and soul into it.

19 MS. KAUFFMAN: Thank you, Your Honor.

20 THE COURT: So, and it's duly noted as well defended by
21 the defense counsel as well.

22 MR. WAGNER: Thank you.

23 THE COURT: So, I think it is also the right and fair
24 thing to get done here. So, you know, sometimes we are so
25 focused on these legal issues that we lose that big picture. And

1 I do think this is the right and fair thing to have been done
2 here. All right. I will then await getting the proposed
3 Findings of Fact and Conclusions of Law, which I am assuming is
4 going to resolve this issue about the tax status of the
5 settlement.

6 MS. KAUFFMAN: It will be included in that order.

7 THE COURT: Yes.

8 MS. KAUFFMAN: And Monday you should have it.

9 THE COURT: Okay. Great. Thank you all. And I hope
10 you all go and have a wonderful life and wonderful holiday and no
11 more of these cases. Okay?

12 MS. KAUFFMAN: Have a wonderful life.

13 MR. WAGNER: Thank you, Judge.

14 THE COURT: All right. Court is in recess.

15 (Court Adjourned at 1:29 p.m.)
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7 I certify that the foregoing is a correct transcript
8 from the electronic sound recording of the proceeding in the
9 above-entitled matter.

10 /s/ Lissa C. Whittaker
11 Signature of transcriber
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December 10, 2018
Date